

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALBERT JOHN FREEMAN,

Plaintiff,

No. C 13-04179 JSW

v.

DELTA AIR LINES, INC.,

Defendant.

**ORDER RE MOTION FOR  
SANCTIONS**

Now before the Court is the motion for sanctions against Plaintiff's counsel filed by Defendant Delta Airlines, Inc. ("Defendant"). The Court finds that this matter is appropriate for disposition without oral argument. *See* N.D. Civ. L.R. 7-1(b). Accordingly, the hearing set for February 10, 2017 is HEREBY VACATED. Having considered the parties' pleadings and the relevant legal authority, the Court hereby DENIES the motion to disqualify counsel with a strong reprimand to cease all activity related to contacting Defendant's employees.

It appears from the record submitted in this matter, that counsel for Plaintiff, John Carpenter and Charles Kulas, contacted Louis Naber, a contractor for Delta, either for the purpose of engaging him as an expert witness or to query him about contents of documents produced in this litigation.<sup>1</sup> Without needing to resolve the factual discrepancies in the record,

<sup>1</sup> The Court has reviewed the entire record, including the sur reply and the sur-sur reply. The parties should work to agree to the terms of their submissions without requiring the interference of this Court for every minor squabble. Should the parties not be able to

1 it is clear that Naber's employment status was imminently discoverable from LinkedIn or from  
2 querying him directly. Accordingly, the Court imputes knowledge of his employment status to  
3 Plaintiff's counsel. The record also indicates that Naber is not an officer or director for  
4 Defendant nor is there evidence that the subject matter of counsels' queries could be imputed to  
5 Defendant as a matter of law.

6 What is clear from the record submitted by the parties is that counsel for Plaintiff twice  
7 contacted an employee for Defendant. There is no question that the conduct is inappropriate  
8 and under no circumstances should it be permitted to continue. However, the remedy sought by  
9 Defendant to disqualify counsel pursuant to California Rule of Professional Conduct 2-100  
10 ("Rule 2-100") is not appropriate either. Rule 2-100 currently provides that "[w]hile  
11 representing a client, a member [of the bar] shall not communicate directly or indirectly about  
12 the subject of the representation with a party the member knows to be represented by another  
13 lawyer in the matter, unless the member has the consent of the other lawyer." For purposes of  
14 the Rule, the definition of a "party" includes an "officer, director, or managing agent" or "an  
15 employee . . . if the subject of the communication is any act or omission of such person in  
16 connection with the matter which may be binding upon or imputed to the organization for  
17 purposes of civil [] liability or whose statement may constitute an admission on the part of the  
18 organization." *Id.*

19 The scope of Rule 2-100 is clear: "[R]ule 2-100 permits opposing counsel to initiate ex  
20 parte contacts with . . . present employees (other than officers, directors of managing agents)  
21 who are not separately represented, so long as the communication does not involve the  
22 employee's act or failure to act in connection with the matter which may bind the corporation,  
23 be imputed to it, or constitute an admission of the corporation for purposes of establishing  
24 liability." *Snider v. Superior Court*, 113 Cal. App. 4th 1187, 1202 (2003) (citing *Triple A*  
25 *Machine Shop, Inc. v. State of California*, 213 Cal. App. 3d 131, 140 (1989)). The Rule

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27 cooperate effectively in the eventual presentation of this matter for final adjudication on the  
28 merits, the Court may require the hiring of a Special Master to regulate the conduct of the  
parties before submissions to the Court and charge the cost of such services to the party  
creating the need for them.

1 prohibits contact with employees of the opposing party in litigation who are in the control group  
2 (*i.e.*, officers or directors) or communications with employees not in the control group about  
3 subject matter that “is the employee’s act of failure to act in connection with the matter at issue,  
4 *and* that act or failure to act could bind the organization, be imputed to it, *or* if the employee’s  
5 statement could constitute an admission against the organization.” *Id.* at 1203 (emphasis in  
6 original). Although Defendant submits evidence that the Rule may change to include an agent  
7 or other constituent of the organization within its scope, but regardless the agent would need to  
8 be able to bind the organization. *See* Supplemental Declaration of Alexander Solo, Ex. 3 at 15.)  
9 The Rule only restricts *ex parte* communications with the control group of employees or if the  
10 subject matter of the communication can be imparted to the organization. *See also United*  
11 *States v. Sierra Pacific Industries*, 857 F. Supp. 2d 975, 980-81 (E.D. Cal. Nov. 18, 2011) (Rule  
12 2-100 applies to officers and directors as well as subject matter that may constitute admissions  
13 by agents of requisite authority to bind the organization). As the record now stands, although  
14 Naber is an employee of Defendant as a contractor, there is no indication that he is a member of  
15 the control group of employees or that the subject matter of the communications with Plaintiff’s  
16 counsel could serve to bind Defendant. Accordingly, the Court must DENY Defendant’s  
17 motion to disqualify counsel for violation of Rule 2-100.

18         However, the Court remains concerned about the conduct of Plaintiff’s counsel in this  
19 matter. The Court admonishes counsel that it will strictly apply all rules of ethics and common  
20 sense. There is ample case law indicating that in cases where an attorney has reason to believe  
21 that an employee of a represented organization might be covered by Rule 2-100, “that attorney  
22 is well advised to either conduct discovery or communicate with opposing counsel concerning  
23 the employee’s status before contacting the employee. A failure to do so may, along with other  
24 facts, constitute circumstantial evidence that an attorney had actual knowledge that an employee  
25 fell within the scope of rule 2-100. It might further provide support for a more drastic sanction  
26 if a violation of rule 2-100 is found. Further, [] once actual contact is made, an attorney should  
27 first ask questions that would establish the employee’s status within an organization before  
28 moving to substantive questions.” *Snider*, 113 Cal. App. 4th at 1215-16. It is clear here that no

1 such precautions were followed by Plaintiff's counsel. They skirted the edge of the ethical rule,  
2 but did not baldly violate it. The Court will not impose the sanction of disqualifying counsel  
3 from this matter at this time, but finds that the unnecessary expense of having to bring this  
4 motion should be reimbursed to Defendant. Accordingly, Defendant shall submit a declaration  
5 by no later than February 10, 2017 setting out its fees and costs incurred with the filing of its  
6 motion for sanctions. Plaintiff may file a response to that declaration by no later than February  
7 17, 2017. Thereafter, the Court shall issue an order on the amount of reimbursement.

8 Counsel are hereby admonished that any future failure to follow their ethical and  
9 professional obligations will result in the imposition of severe sanctions.

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11 **IT IS SO ORDERED.**

12 Dated: January 31, 2017

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15 JEFFREY S. WHITE  
16 UNITED STATES DISTRICT JUDGE  
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